

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MARKO R.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2011081109

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 12, 2011, in Culver City.

Claimant was represented by his mother and father.¹

Lisa Basiri, Fair Hearing Coordinator, represented the Westside Regional Center (Service Agency).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on October 12, 2011.

ISSUE

Whether the Service Agency should increase claimant's behavior intervention services to 25 hours per week.

¹ Claimant and his parents are identified by titles or initials to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-13; claimant's exhibits A-C.

Testimonial: Soryl Markowitz, L.C.S.W.; Lisa Basiri; and claimant's mother and father.

FACTUAL FINDINGS

1. Claimant is a four-year-old boy who is an eligible consumer of the Service Agency based on his diagnosis of autistic disorder and mild intellectual disability. Claimant lives with his mother and father. Claimant's mother is a homemaker and his father is employed outside the home.

2. Claimant is dependent on others for his self-care needs, such as bathing and dressing. He uses a diaper and holds his bowel movements throughout the day because he does not want anyone but his parents to change the diaper. Claimant will only consume food that is freshly made and his mother has to feed it to him because he does not like to touch food. Claimant has no safety awareness. He will wander away and run into the street if not supervised. He does not respond when his name is called. Claimant used to know some sign language, but mother reports he has regressed and no longer uses signs or words. Claimant will hit or kick mother when he is upset or denied a preferred object or activity. He flaps his hands and throws things on the floor. He engages in non-compliance and perseveration daily. He has two to three tantrums per day, each lasting 30 minutes. He does not initiate interaction with peers and runs away or pushes away other children who approach him.

3. Pursuant to an individual program plan (IPP) dated June 20, 2011, the Service Agency currently provides claimant with 31 hours per month of behavior intervention services through Behavior Frontiers. The Service Agency funds behavior services for claimant to meet his IPP goal to "decrease his problematic behavior." The 31 hours per month consists of approximately five hours per week of direct service and parent training, 1.5 hours per week of supervision, and two hours per month for team meeting attendance. Behavior Frontiers provides services to claimant in his home two times per week, with each session lasting two hours and 30 minutes. Claimant's mother is present and participates in the training.

4. Claimant attends preschool at Richland Elementary School. He has classroom instruction from 9 a.m. to 11:20 a.m., and then he attends the Kids Program on the same campus from 11:20 a.m. to 1:50 p.m. The Kids Program is a preschool intensive class funded by the school district. The school district provides claimant

with occupational therapy, adapted physical education, physical therapy, and language and speech services. The Kids Program provides orientation to speech therapy, implements sensory strategies, has a strong behavioral curriculum, and helps develop skills for social interaction. The staff work closely with the children, generally two children at a time except during circle time.

5. By letter and a Notice of Proposed Action (NOPA) dated August 11, 2011, the Service Agency notified claimant's parents that it denied their request to increase claimant's behavior services to 25 hours per week. The NOPA cited Welfare and Institutions Code sections 4648.5 and 4686.2 as legal authority for the denial. On August 18, 2011, claimant's parents filed a fair hearing request, on claimant's behalf, to appeal the Service Agency's decision denying their request.

6. Claimant's parents want to increase their son's in-home behavior services to 25 hours per week. They feel the in-home behavior services are beneficial for their son. After the sessions with his Behavior Frontiers therapist, claimant is calmer, he does not whine or have tantrums, he does not engage in self-stimulatory behaviors, he has increased communication with his parents, he is more responsive to his parents, and he has improved eye contact. Claimant's mother feels she also benefits from the sessions because she is learning strategies on how to manage and respond to claimant's behavioral challenges.

7. Claimant's parents feel their son is spending too many hours at school. While they are pleased with the Kids Program, the parents feel that claimant is not benefitting from the classroom instruction during the first two hours of the school day. The parents also have difficulty getting claimant ready in the morning for school. The parents would like claimant to go to school at 11:20 a.m. and only to receive supportive services. During the first two hours in the morning before school, claimant's parents want their son to receive behavior services at home. The parents feel that until claimant's behavioral challenges and deficits in basic skills are addressed, claimant is not capable of learning what is taught in the classroom. They feel additional hours of behavior services in the home will serve this purpose.

8. Soryl Markowitz is the Service Agency's autism and behavior services consultant. Ms. Markowitz is a certified early childhood education specialist and a licensed clinical social worker. She holds a degree in psychology. She has worked with children with autism and behavioral issues since 1970. Ms. Markowitz is familiar with claimant's case and testified credibly at the hearing.

9. The Service Agency contends that 25 hours per week of behavior services for claimant is not appropriate for his age, needs, and challenges. Ms. Markowitz spoke with Kelly Kratzer (clinical supervisor) and Denice Renteria (case manager) at Behavior Frontiers. According to Ms. Markowitz, both Ms. Kratzer and Ms. Renteria agreed that if claimant's direct service hours are increased, a gradual increase to 10 hours per week would be appropriate. They both agreed that, at this

time, claimant cannot handle more than 10 hours per week of direct behavior intervention.

10. Ms. Markowitz testified that the current research and best practices standards support no more than a total of 40 hours per week of services for children with autism. There is no research that supports a program of more than 40 hours per week of services. The 25 hours per week of services requested by parents would put claimant's school and regional center services over 40 hours per week. Ms. Markowitz opined that 25 hours per week of in-home behavior services would be intolerable for a child of claimant's age.

11. On October 11, 2011, Ms. Markowitz happened to be in claimant's classroom to observe another child. She was also able to observe claimant. She saw that claimant had difficulty making the transition between classes and had a tantrum that lasted one minute and a half. Ms. Markowitz saw that the classroom staff was able to manage the tantrum, and get claimant to stand up and go to the visual schedule to see the next class activity. Claimant responded to the staff, he observed what the other children were doing, and he sat in the circle with the other children.

12. Ms. Markowitz opined that claimant's classroom attendance is appropriate for him to develop skills and have opportunities to interact with other children. Claimant would benefit from interacting with other children in a classroom setting, as he would learn to model the behavior of other children, follow routines, engage in activities, talk, and interact with adults other than his parents. He would not have this opportunity if he just worked at home one-to-one with an adult.

13. Based on her review of the information available to the Service Agency, her observation of claimant in the classroom, and her discussion with Behavior Frontiers, Ms. Markowitz recommends increasing claimant's behavior services to 10 hours per week with two hours per week of face-to-face consultation with the parents. She recommends that the increase to 10 hours per week should be done gradually.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)²

2. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) "The determination of which services and supports are necessary for each

² All further statutory references are to the Welfare and Institutions Code.

consumer shall be made through the [IPP] process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by the individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost effectiveness of each option." (§ 4512, subd. (b).)

3. A regional center is required to identify and pursue all possible sources of funding for consumers receiving regional center services, including but not limited to governmental or other entities or programs required to provide or pay the cost of providing services, such as school districts. (§ 4659, subd. (a).)

4. A regional center is required to use generic services and supports when appropriate. "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§ 4648, subd. (a)(8); see also, § 4646, subd. (d). A regional center generally may not purchase educational services for children three to 17 years of age. (§ 4648.5, subd. (a)(3).)

5. The services and supports that may be listed in a consumer's IPP include, but are not limited to, "behavior training and behavior modification programs." (§ 4512, subd. (b).)

6. A regional center shall "[o]nly purchase ABA services or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions." (§ 4686.2, subd. (b)(1).) The term "evidence-based practice" means "a decisionmaking process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics." (§ 4686.2, subd. (d)(3).) A regional center shall not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services. (§ 4686.2, subd. (b)(3).)

7. Where a change in the status quo is sought, the party seeking the change has the burden of proving that a change is necessary. (Evid. Code, §§ 115 and 500.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. "Preponderance of the evidence" means evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. (BAJI No. 2.6 (8th ed. 1994).)

8. In this case, claimant has not met his burden of proving that an increase in behavior services to 25 hours per week is necessary to meet the behavioral needs and goals identified in his IPP. Claimant's current service provider, and the Service Agency's consultant, Ms. Markowitz, agree that claimant cannot tolerate that level of

behavior services at this time. Further, the parent's proposal to substitute the first two hours of the school day with two hours of behavior services at home is not allowed under the Lanterman Act, as it would result in regional center funds supplanting the budget of the school district, which has the legal responsibility to serve all members of the general public and receives public funds for doing so.

9. Thus, claimant's appeal of the denial of his request for 25 hours per week of behavior intervention services must be denied. However, the Service Agency's evidence at hearing established that a gradual increase in claimant's behavior services from five hours per week to 10 hours per week, with two hours per week of parent consultation, would be appropriate to meet claimant's needs. The Service Agency shall be ordered to provide that level of services.

ORDER

Claimant's appeal is granted in part and denied in part as follows:

1. The Service Agency shall fund behavior intervention services for claimant of 10 hours per week of direct service, and two hours per week of parent consultation. The increase to 10 hours per week may be implemented gradually.
2. In all other respects, claimant's appeal is denied.

DATED: October 19, 2011

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.